

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 21, 2009

JIMMY LEE BONDS v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Davidson County
No. 2003-D-2670 Steve Dozier, Judge**

No. M2008-01810-CCA-R3-PC - Filed October 21, 2009

Petitioner, Jimmy Lee Bonds, was convicted in the Davidson County Criminal Court of especially aggravated robbery, first degree premeditated murder, felony murder, and two counts of aggravated burglary. As a result, he was sentenced to life in prison plus twenty-eight years. Petitioner's convictions were affirmed by this Court on direct appeal. *State v. Jimmy Lee Bonds*, No. M2005-02546-CCA-R3-CD, 2006 WL 2773455, at *1 (Tenn. Crim. App., at Nashville, May 16, 2006), *perm. app. denied* (Tenn. Jan. 22, 2007). The Tennessee Supreme Court denied permission to appeal. Petitioner then sought post-conviction relief on the basis that the convictions were based upon a coerced confession and that he received ineffective assistance of counsel. Following a hearing, the post-conviction court denied relief. Petitioner appeals this decision. After our review of the record, we determine that Petitioner has failed to show that he received ineffective assistance of counsel. Accordingly, the judgment of the post-conviction court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Dwight E. Scott, Nashville, Tennessee, for the Appellant, Jimmy Lee Bonds.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Victor S. Johnson, III, District Attorney General, and Rachel Sobrero, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

Petitioner and David Lee Kestner were indicted in October of 2003 by the Davidson County Grand Jury for two counts of aggravated burglary, one count of first degree premeditated murder,

one count of felony murder, and one count of especially aggravated robbery. At trial, Petitioner was convicted of two counts of aggravated burglary, one count of first degree premeditated murder, one count of felony murder, and one count of especially aggravated robbery. Petitioner's conviction for first degree premeditated murder merged with the conviction for felony murder. Petitioner received an effective sentence of life in prison plus twenty-eight years. The facts which gave rise to Petitioner's conviction are taken from the opinion entered on the direct appeal:

On April 22, 2003, the appellant broke into the apartment of the victim, Thomas West, and stole some marijuana. Four days later, on April 26, 2003, the appellant and a co-defendant again broke into the victim's apartment and, during the break-in, killed the victim. . . .

At trial, the victim's sister, Sharon Ann West, testified that at the time of the offenses, the victim, Thomas West, lived at apartment 120 of the Spinnaker Cove Apartments on Arbor Lake Drive in Nashville. The apartment was located on the third floor of the building. On April 22, 2003, the victim stayed home all day, watching a basketball game with West's youngest son. The next day, he went out on his boat. On April 25, 2003, the victim had a security system installed in his apartment. On April 26, 2003, the victim stayed in the apartment, again watching sports with West's youngest son.

Later in the evening of April 26, 2003, West received a call from the victim's security system provider, advising that the victim's alarm had been activated. West drove to the victim's apartment and saw a number of people in the parking lot. The victim's next-door neighbor saw West and told her not to go upstairs because the victim's apartment had been broken into, and the perpetrators might still be inside. West called her husband and waited for police to arrive. When an officer arrived on the scene, West followed him upstairs. The officer opened the door, and West saw the victim lying on the floor. The officer then pushed West out of the apartment.

West acknowledged that some of the victim's friends were "not savory law abiding people." West stated that she was aware that the victim occasionally smoked marijuana, dabbled in drugs, and kept drugs at his apartment. At the State's request, West looked at pictures of the appellant and his co-defendant, David Kestner. In both pictures, the men were wearing necklaces that belonged to the victim.

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Officer Bruce E. Landes with the Metropolitan Police Department (Metro) testified that on April 26, 2003, he was dispatched to the Spinnaker Cove Apartments on a home invasion call. Upon his arrival, he walked up the stairs to the victim's apartment. The front door of the apartment was open, but it did not display signs of forced entry. The apartment smelled strongly of marijuana, and a big screen

television was on with the volume turned up high. Officer Landes saw the victim lying on the floor. He had no pulse, and blood was coming from his nose and mouth. Officer Landes radioed dispatch, requesting that MedComm speed their arrival to the scene. When MedComm arrived, they tested the victim for signs of life and found none.

Officer Landes' sergeant arrived on the scene and helped him to ensure that no suspects were hiding in the apartment. As he went through the apartment, Officer Landes observed that it had been ransacked. He noticed that there appeared to be signs of forced entry from the door leading to the balcony.

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On April 29, 2003, Detective Dunaway spoke with Mike Miner, an individual who police believed had information regarding the people involved in the homicide. Miner agreed to wear a body wire while talking with the appellant. The tape-recorded conversation between Miner, the appellant, and the appellant's girlfriend was played for the jury.

On the tape, the appellant acknowledged that he had been in the victim's apartment on a prior occasion, ostensibly for criminal purposes. Miner asked the appellant why he had returned to the victim's apartment despite his previous assertion that he would never return to a crime scene. The appellant told Miner that he went back to get the money that Miner had said was in the victim's apartment. The appellant said that he went up a ladder into the victim's apartment, and he saw Kestner shoot the victim. Thereafter, the appellant and Kestner ransacked the victim's apartment. The appellant said that at the time of the homicide he was wearing gloves; therefore, if police had found his fingerprints in the apartment, the prints must have been there from his first foray into the apartment. Before he went to the victim's apartment the first time, the appellant told Miner he would prefer to go when the victim was not there so he could get all of the money in the apartment. Miner had cautioned the appellant that he might have to kill the victim, and the appellant stated that he was "fine" with that prospect. The appellant said that when he and Kestner went to the victim's apartment, they were prepared to do what they had to do to get the money from the victim or his apartment.

After Miner wore the wire and obtained incriminating information on the appellant, police spoke with the appellant. A videotape of that interview was shown to the jury. The video revealed that police advised the appellant of his Miranda rights and asked him to tell them about the night of the homicide. The appellant admitted that he had burglarized the victim's apartment several days before the homicide. At that time, he broke in through the front door and stole seven pounds of marijuana. The appellant stated that he knew the victim was not at home on that occasion

because he had been told that the victim was out on his boat. He said that he knew the victim had drugs in the apartment because “Mike” had told him that the victim was a drug dealer.

The appellant told police that after the burglary, he told “Mike” what he had taken from the victim’s apartment. “Mike” told the appellant that he should have found \$10,000 or \$15,000 in cash that the victim kept in a safe. The appellant said that although he was aware that the street value of the marijuana he stole was approximately \$6,000, he sold it for less than \$3,000 because it was “all profit.”

The appellant said that he told Kestner that “lots of money” was supposed to be in the victim’s apartment. Kestner wanted to break into the victim’s apartment through the balcony. The appellant surmised that Kestner did not want to go through the front door because he was afraid of being seen. The appellant told police that on the night of the homicide Kestner had a .25 caliber gun, and he had carried a .9 millimeter gun. The appellant was wearing a tan “Dickies outfit” and work gloves. When the men arrived at the victim’s apartment, they drove around for a while until they discovered a utility van with a ladder attached to the roof. Kestner cut the ladder free of the straps holding it, and the men drove back to the victim’s apartment with the ladder on top of Kestner’s car. The appellant said that he knew prior to going to the victim’s apartment that the victim was rumored to always carry a .45 caliber gun.

The men knew that the victim was home before they went into the apartment; they had seen his vehicle in the apartment parking lot. Additionally, the appellant saw that a female named “Lou” was in the apartment with the victim. He said that he did not want to put her in a bad situation, and he was going to call “it” off. However, he saw Lou leave, and they proceeded with their plan. They put the ladder against the building. Kestner went up the ladder first then motioned for the appellant to follow. The appellant became nervous and started to freeze up, but he continued up the ladder. He heard the victim’s television on at a high volume. As the appellant was coming through the balcony door, he heard Kestner fire a shot. Kestner then fired a second shot into the victim’s head, near his eye.

The appellant stated that after the shooting, the men ransacked the apartment. They took jewelry, a safe which contained a bank statement indicating that the victim had recently deposited \$10,000, digital scales, approximately one pound of marijuana, a DVD player, various paperwork, and a .357 caliber Smith and Wesson gun. The appellant said that they put the items into the victim’s black leather bag for transport. They left through the front door, triggering the alarm system.

The appellant told police that he had stored his .9 millimeter gun underneath his mother’s bed. He said that the victim’s .357 caliber gun was underneath a mattress, and the black leather bag was in the living room of his mother’s house.

Detective Dunaway testified that the appellant's mother gave police consent to search her home at 1617 Long Avenue. Therein, police found the appellant's .9 millimeter gun, the victim's .357 caliber gun, his digital scales, and a black leather bag. Additionally, both the appellant and the co-defendant, David Kestner, were photographed wearing the victim's jewelry.

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The defense called a single witness, Michael Miner. Miner stated that he wore a body wire for the State and obtained an incriminating tape recording of the appellant. Miner said that the appellant told him about stealing the victim's marijuana during the first burglary. Miner acknowledged that he could have spoken with the appellant about the victim and his boat because he believed that the victim "had a cool boat." He stated that he asked the appellant why he went back to the victim's apartment after the first burglary, noting that the appellant had "done a few things in the past, and that was his number one rule, you never go back to the same place twice." Miner conceded that his wife had previously purchased marijuana from the victim. Additionally, Miner admitted that the appellant might have given him some marijuana from the first burglary. Miner said that he might have told the appellant that he had overlooked money in the victim's apartment.

Jimmy Lee Bonds, 2006 WL 2773455, at *1-5.

On direct appeal, Petitioner challenged the sufficiency of the evidence relating to his murder convictions, the trial court's failure to timely rule on the motion for judgment of acquittal, and the imposition of consecutive sentencing. *Id.* at *1. This Court determined that the evidence was sufficient to support the convictions. *Id.* at *6-7. Petitioner also argued that the trial court committed plain error by taking the motion for judgment of acquittal under advisement where Petitioner did not object to the practice at trial and offered proof in his behalf prior to the trial court's ruling. *Id.* at *7. This Court determined that Petitioner waived the issue and "failed to meet the test for plain error review." *Id.* at *10. Petitioner's sentence was also affirmed. *Id.* at *12. The supreme court denied permission to appeal on January 22, 2007.

Petitioner filed a pro se petition for post-conviction relief in which he alleged that he received ineffective assistance of counsel from the two attorneys that represented him at trial. Specifically, Petitioner alleged that trial counsel: (1) failed to develop a reasonable trial strategy; (2) failed to adequately investigate Petitioner's case; (3) failed to develop a defense; (4) failed to request jury instructions regarding Petitioner's intoxication at the time of the offense; and (5) failed to request a mental evaluation. Petitioner also asserted that his conviction was based on a coerced confession.

Counsel was appointed to represent Petitioner and an amended petition was filed. In the amended petition, Petitioner alleged that trial counsel failed to order blood samples that would have shown his intoxication at the time of his statements. The amended petition also alleged that trial

counsel erred by failing to object when the trial court took the motion for judgment of acquittal under advisement.

Evidence at the Post-conviction Hearing

At the hearing on the post-conviction petition, Petitioner presented the testimony from both attorneys who were appointed to represent Petitioner at trial. Lead trial counsel had experience with several first degree murder trials prior to representing Petitioner. She was appointed to represent Petitioner after an attorney that had been retained by Petitioner's family withdrew from the case five months prior to trial. The public defender's office also assigned an attorney to assist lead trial counsel with the case.

Lead trial counsel testified that there were not many viable defense theories in Petitioner's case and even described the case as unwinnable. Specifically, lead trial counsel noted that Petitioner admitted his need to kill the victim during his taped conversation with Mr. Miner. Further, Petitioner was found with the victim's possessions on his person and at his home. Prior to trial, lead trial counsel knew that the State's theory of the case would be that the codefendant was the shooter but that Petitioner knew that the murder had occurred while he was participating in the burglary of the apartment. Lead trial counsel recalled trial counsel's attempts to persuade Petitioner to enter a plea agreement prior to trial and stated that, at one time, the State had offered Petitioner an effective sentence of thirty years. Petitioner rejected this offer. Lead trial counsel felt that if she had had more time prior to trial, she could have secured a better offer for Petitioner.

As far as a defense strategy, lead trial counsel testified that they approached the case from the standpoint that Petitioner was not the shooter. Prior to trial, the defense team examined the possibility of filing a motion to suppress Petitioner's statements. They determined that no basis existed for a motion to suppress. Further, one of the statements made by Petitioner actually had information in it that was favorable to the defense theory.

Lead trial counsel admitted that she never thought about obtaining evidence of Petitioner's intoxication at the time of his statements. Lead trial counsel testified that there was nothing in the recorded statements that suggested to her that Petitioner was intoxicated such that his statement was involuntary.

Prior to trial, trial counsel discussed the possibility of a mental health defense. As a result of these discussions, lead trial counsel made the determination that a mental health defense would not have been successful. In other words, Petitioner's mental health was not a concern to trial counsel.

Lead trial counsel admitted that the failure to object to the trial court's decision to take the motion for judgment of acquittal under advisement was error under current law. Lead trial counsel was unaware if the issue was preserved in the motion for new trial. She explained that she called Mr. Miner as a defense witness in an attempt to deflect some of the responsibility for the crime to

Mr. Miner. To that end, the defense attempted to paint Mr. Miner as the “mastermind” behind the crime.

Co-counsel also joined the defense team five months prior to trial. Co-counsel was present during discussions with Petitioner about the possibility of a motion to suppress. Both lead trial counsel and co-counsel agreed that the motion to suppress Petitioner’s statements to police lacked a legal basis. Co-counsel did not recall a discussion regarding a motion to suppress based on Petitioner’s intoxication.

Petitioner testified at the hearing. He recalled meeting with counsel several times prior to trial, discussing the evidence that the State had against him. Petitioner rejected the plea offer from the State because he did not feel like he was guilty of murder. Petitioner explained that he did not want to take a plea because he “didn’t kill anybody.” Petitioner acknowledged that trial counsel had explained the concept of criminal responsibility but claimed that he did not fully understand the concept.

Petitioner remembered asking trial counsel to file a motion to suppress his statements based on offers of leniency from the police and because he was under the influence of marijuana at the time the statements were taken. Specifically, Petitioner claimed that Mr. Miner offered him drugs prior to the recorded conversation. Petitioner claimed that he only made incriminating statements after smoking marijuana. Petitioner insisted that he was “high” when he got booked and that blood samples had been drawn. Petitioner complained that trial counsel did not attempt to obtain the results from the blood tests even after he asked them to do so.

Petitioner acknowledged that he did not inform trial counsel that he was evaluated by Middle Tennessee Mental Health Institute as a juvenile. Petitioner acknowledged that despite this history, he was currently not suffering from any mental incapacity. Petitioner insisted, however, that his mental state was different at the time of the crime. Petitioner admitted that he had no problem communicating with trial counsel but expressed frustration because they did not do what he asked them to do prior to trial.

Petitioner claimed that after he was convicted, lead trial counsel came to prison and informed him that if he agreed to testify against Mr. Miner that his sentences would be changed to run concurrently. Petitioner refused to testify. Trial counsel did not recall this conversation.

At the conclusion of the hearing, the post-conviction court took the matter under advisement. In an order, the post-conviction denied the petition. Specifically, the post-conviction court determined that Petitioner failed to show that he received ineffective assistance of counsel. The post-conviction court found that trial counsel made a tactical decision not to file a motion to suppress and that trial counsel were not ineffective for failing to request blood sample evidence. The post-conviction court accredited the testimony of trial counsel regarding Petitioner’s mental health issues. In other words, the post-conviction court determined that there was no indication of mental health issues that would have justified action on the part the defense team. The post-conviction court also

determined that it “did not constitute ineffective assistance” when trial counsel failed to object to the trial court’s decision to take the motion for judgment of acquittal under advisement in light of this Court’s determination that the failure was not plain error and Petitioner failed to demonstrate prejudice as a result of trial counsel’s failure to act. Finally, the post-conviction court determined that it was not ineffective for trial counsel to fail to raise the motion for judgment of acquittal issue in the motion for new trial where this Court “addressed [the issue] on appeal and decided [it] against [Petitioner].” As a result, the post-conviction court denied post-conviction relief.

Petitioner appeals the decision of the post-conviction court. On appeal, Petitioner argues that trial counsel were ineffective for: (1) failing to file a motion to suppress; (2) failing to object when the trial court took the motion for judgment of acquittal under advisement; and (3) failing to investigate Petitioner’s mental health.

Analysis *Post-Conviction Standard of Review*

The post-conviction court’s findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issues raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court’s findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court’s conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Shields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

Ineffective Assistance of Counsel

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below “the range of competence demanded of attorneys in criminal cases.” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In order to demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel’s deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). “Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim.” *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997).

As noted above, this Court will afford the post-conviction court's factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court's findings. *See id.* at 578. However, our supreme court has "determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo" with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Failure to File Motion to Suppress

Petitioner argues on appeal that trial counsel were ineffective because they failed to file a motion to suppress his statements prior to trial. Specifically, Petitioner contends that he was "high" at the time he gave statements to the police and the statements were, therefore, involuntary.

The proof at the hearing on the post-conviction petition indicated that both lead trial counsel and co-counsel investigated the possibility of filing a motion to suppress. The attorneys concluded that Petitioner did not appear so intoxicated that the statement was involuntary. Further, there was evidence in one of the statements that was actually favorable to the defense. The post-conviction court determined that the decision to forgo a motion to suppress was a tactical decision made by trial counsel after preparation for the case. Again, we will not second-guess a reasonably-based trial strategy that is made after adequate preparation for the case. *Adkins*, 911 S.W.2d at 347; *Cooper*, 847 S.W.2d at 528. The evidence does not preponderate against the determination of the post-conviction court.

Failure to Object When Trial Court Took Motion for Judgment of Acquittal Under Advisement

Next, Petitioner contends that trial counsel rendered ineffective assistance when they failed to object when the trial court took the motion for judgment of acquittal under advisement at the close of the State's proof and failed to raise the issue in a motion for new trial. The State argues that because the evidence produced by the State was sufficient to support Petitioner's convictions, he was not prejudiced by trial counsel's failure to object to the trial court's erroneous action.

Recently, in *Finch v. State*, 226 S.W.3d 307 (Tenn. 2007), the supreme court examined a nearly identical situation. In *Finch*, an appeal was granted so the court could "determine whether counsel was ineffective in failing to object when the trial court erroneously took [the petitioner's] motion for judgment of acquittal under advisement and in continuing to participate in the trial

thereafter.” 235 S.W.3d at 310. The court noted the intermediate court’s reliance on *Mathis v. State*, 590 S.W.2d 449 (Tenn. 1979), in which the supreme court held that “[t]here is no authority in our practice or procedure in a criminal case for the trial judge to take under advisement a motion for a judgment of acquittal made at the conclusion of all the State’s proof.” *Id.* at 453. “Rather, if the State fails to adduce sufficient proof during its case-in-chief to support a conviction, the trial court has no alternative upon a defendant’s motion for judgment of acquittal but to direct a verdict in the defendant’s favor. *Finch*, 226 S.W.3d at 313 (citing *Mathis*, 590 S.W.2d at 453). In *Finch*, trial counsel admitted that he was unaware of the decision in *Mathis* and failed to object at trial when the trial court took the motion for judgment of acquittal under advisement. *Finch*, 226 S.W.3d at 314. The supreme court determined that:

[I]n order to assess the prejudice prong of the Petitioner’s claim of ineffective assistance of counsel, we must determine whether the evidence was sufficient as of the close of the State’s proof to support a denial of the Petitioner’s motion for judgment of acquittal. If the State’s proof was sufficient to withstand the motion, then trial counsel’s failure to stand on the motion and challenge its denial on direct appeal did not prejudice the Petitioner because the appeal would have been denied on its merits.

This determination requires us to “look only at all the evidence introduced by the State, to take the strongest legitimate view of it in favor of the State, and to allow all reasonable inferences from it in the State’s favor. We may deem evidence sufficient when it allows *any* rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. A judgment of acquittal is not an all or nothing proposition. A court may grant a judgment of acquittal as to the higher charge and proceed on a lesser-included offense.

Finch, 226 S.W.3d at 317-18 (internal citations omitted) (emphasis in original). After examining the proof in *Finch*, the supreme court determined that the evidence was sufficient to support the convictions. Thus, the court concluded that the petitioner had not been prejudiced “by the manner in which his lawyer handled the motion for judgment of acquittal.” *Id.* at 320. Accordingly, the petitioner was not entitled to post-conviction relief. *Id.*

The same analysis applies herein. Lead trial counsel and co-counsel admitted their failure to object when the trial court took the motion for judgment of acquittal under advisement. Further, they openly admitted that they presented proof on behalf of Petitioner at trial and failed to raise the issue in a motion for new trial. We determine that the failure of trial counsel to object to the trial court’s practice was erroneous. However, in order to prevail on this claim, Petitioner must establish prejudice. In order for this Court to determine if Petitioner was prejudiced by trial counsel’s failure to object, we must review the sufficiency of the evidence. This Court already determined on direct appeal that the evidence was clearly sufficient to support Petitioner’s convictions. *Jimmy Lee Bonds*, 2006 WL 2773455, at *8. The supreme court denied permission to appeal. *Id.* at *1. We agree that the evidence was sufficient to support the convictions. Because the evidence was sufficient to

support the convictions at the time the motion for judgment of acquittal was made, Petitioner cannot establish that he suffered prejudice as a result of trial counsel's error. This issue is without merit.

Failure to Investigate Petitioner's Mental Health

Finally, Petitioner alleges that the post-conviction court improperly denied relief where trial counsel failed to pursue an investigation of Petitioner's mental health. The post-conviction court determined that there was no proof of a mental health issue and accredited the testimony of lead trial counsel who testified that she did not think Petitioner's mental health had been an issue. As stated above, "questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact" and the post-conviction court's credibility determinations are conclusive on appeal unless the evidence preponderates against them. *Odom*, 928 S.W.2d at 23. The evidence does not preponderate against the post-conviction court's credibility determination herein. Petitioner has failed to prove by clear and convincing evidence that trial counsel neglected to assess his mental health or that his mental health was an issue that could have been raised prior to trial or at trial. This issue is without merit.

Conclusion

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

JERRY L. SMITH, JUDGE